NO. 89-903

Supreme Court, U.S.
FILED
NOV 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States

October Term 1989

Vernon C. Davis and
Elmira S. Davis

Petitioners.

-V.-

Thomas Farasy, President
Perpetual Real Estate Services, Inc.
Thomas P. Smith, Esq. of
O'Malley, Miles and Harrell

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Vernon C. Davis and
Elmira S. Davis
11702 Piscataway Road
Clinton, Maryland 20735
(301) 292-4780

PRO SE

I. QUESTIONS FOR REVIEW

ONE: Whether the due process clause of the Fourteenth Amendment of the United States Constitution and Article 23 of the Maryland Declaration of Rights require a hearing prior to the taking of real property.

TWO: Whether the abuse of discretion by Judge Perry in not disqualifying defendants' counsel for violations of A.B.A. Code of Professional Responsibilties allowed a fair hearing on the merits of the case.

II. NAMES OF PARTIES

The names of all parties are listed in the caption. The respective counsel is stated in the proof of filing and services.

TABLE OF CONTENTS

	PAGE
QUESTIONS FOR REVIEW	i
TABLE OF AUTHORITIES	iii & iv
STATEMENT OF JURISDICTIONAL GROUNDS	1
STATUTES INVOLVED	1
JURISDICTION OF THE COURT OF APPEALS OF MARYLAND	1
CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
QUESTION ONE	7
QUESTION TWO	12
ARGUMENT	17
CONCLUSION	19
APPENDIX	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Barry Properties v. Pick Bros. 277 Md. 15, 353 A.2d 222, February 10, 1976	7&9
Caplan Bros., Inc. v. The Village of Cross Keys, Inc., 277 Md 41, 353 A.2d 237	9
Coopers & Lybrand v. Livesay, 437 U.S. 469, 57 L Ed.2d, 351, 98 S Ct 2454	13
Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170, 40 L Ed.2d.732 94 S Ct. 2140, 1974	13

Granis v. Ordean, 18

234 U.S. 385, 394 (1914)

Mervin L. Blades & Son, Inc. v. Lighthouse 7&8

Sound Marina and Country Club, et. al,

37 Md. App. 265, 377 A.2d, 523

Morrissey v. Brewer 17

408 U.S. 471, 481

Mitchel v. W.T. Grant Co., 17

416 U.S. 600, 94 S.Ct. 1895,

40 L.Ed.2d 406 (1974)

North Georgia Finishing, Inc. v.

Di-Chem, Inc. 17

419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975)

III. STATEMENT OF JURISDICTIONAL GROUNDS

Petition for writ of certiorari to the Circuit Court for Prince Georges County Maryland was denied June 15, 1989.

Motion for reconsideration denied August 31, 1989.

28 USCA 1257 (1) confers jurisdiction on this Court.

IV. STATUTES INVOLVED

The due process clause of The Federal Constitution Fourteenth Amendment is involved together with Article 23 of the Maryland Declaration of Rights.

V. JURISDICTION OF THE COURT OF APPEALS OF MARYLAND

Jurisdiction in the court of first instance was invoked under the Annotated Code of Maryland - Real Property Section 14-118

VI. CONSTITUTIONAL PROVISIONS

Due Process of Law

.....nor shall any state deprive any person of life, liberty, or property without due process of law;.....

STATEMENT OF THE CASE

DATE: November 4, 1988, In The Circuit Court For Prince Georges County, Maryland, Case No. CAL 7-20139

Motion To Dismiss Granted w/out Leave To Amend

February 8, 1989

Motion to Strike The Appearance of John Miles

Dismissed

February 17, 1989

In Banc Hearing

Denied (Case Closed)

Docket Entries no written orders

Petition number 52, September Term 1989 for Writ of Certiorari Dismissed, June 15, 1989

Petition for Reconsideration, denied Aug. 31, 1989

STATEMENT OF THE FACTS

On September 5, 1984, Elmira S. Davis and Vernon C. Davis entered into a contract with Thomas M. Farasy, President of Sumaweel, Inc. a subsidiary of Perpetual Real Estate Services, Inc., now soley known as Perpetual Real Estate Services, Inc., 1750 Old Meadow Road, suite 200, McLean, Virginia 22102. The contract was for the sale of Real Property described as,

> lot numbered (1), in block lettered "o" in the subdivision known as Mary Catherine Estates," as per plat thereof recorded among the land records of Prince Georges' County, Maryland, in the Plat Book WWW 69, at Plat 59 being in the 5th Election District of Said County.

The aforementioned contract was written by agent Mark Legg, Century 21, Homes Unlimited,

Inc. The contract was for a single family home that was to be built according to plans and specifications and specific resemblance to the model known as the "Jefferson," by builder, Peter G. Gabardini, Jr., Inc. The contract was subsequently settled on or about June 21, 1985 by settlement Attorney, Troese Title Services, Inc., with first deed of trust held by Arlington Mortgage Company.

Thomas Farasy completed settlement on the aforementioned property and did solemnly swear, "...that there are no other Deeds of Trust, Mortgages, Special Assessments levied or pending or other liens or other unpaid bills affecting the property or judgment other than those shown on the settlement statement." The settlement statement indicated that the payments were to be set up with a $1,820.00 escrow for hazards, mortgage insurance, and county property taxes.

However, the actual tax bill was $2,586.09 with a mechanics lien for "Deferred Water and Sewer" charges of $1,240.62.

Thomas Farasy and Perpetual Real Estate Services, Inc. delivered the above mentioned property encumbered by a debt with an annual charge of $1,240.62 with the total amount of deferred water and sewage charges of $11,619.40.

On June 17, 1987 Lorraine D. Martin and Debra O. Linger, trustees of the first mortgage by and through their attorney S. Randall Cohen of Nylen and Glymore, filed suit CAE 87-9723 and Henry F. Leonnig, was retained by the Davis's.

Mr. Leonnig started negotiations with Respondent for cross-demands and Perpetual as Seller of the property, having left a mechanics lien on the property and failing to surrender to the jurisdiction of the Settlement Attorneys for final audit as agreed. Respondents made an offer far short of the relief granted under the applicable

section of the annotated code of Maryland, Real Property Section 14-118.

Mr. Thomas P. Smith, "did pay" monies to the witness in the case without the knowledge of Petitioner's Davis and their attorney, Mr. Leonnig's consent to negotiate with Washington Suburban Sanitation Commission (WSSC) and the cross-complaints for settlement of this case. Mr. Smith's payment for Perpetual Real Estate Services, Inc. "did not pay" the mechanics "lien without notice" for water house connection work performed by Washington Suburban Sanitary Commission, and that lien is still on the property and collected by the county tax office each year.

ONE: Whether the due process clause of the Fourteenth Amendment of the United States Constitution and Article 23 of the Maryland Declaration of Rights require a hearing prior to the taking of real property.

Maryland's lien law is well settled, it is so well settled, I will request permission of the court to omit Supreme Court sites on this question. In lieu of, I request the court to consider the quotation of Judge Powers in the Court of Special Appeals of Maryland in his decision Mervin L. Blades & Son, Inc. v. Lighthouse Sound Marina and Country Club, et. al 37 Md. App. 265, 377 A.2d 523.

> "Mechanics' liens in Maryland were transformed into little more than debt claims when the Court of Appeals, following several due process rulings of the United

States Supreme Court, decided Barry Properties v. Fick Bros., 277 Md. 15, 353 A.2d 222. on 10 February 1976. ....."

"After a thorough and exhaustive analysis of the constitutional principles expressed in the cited opinions of the Supreme Court, and of the Maryland statute, the Court said, at 33, 353 A.2d at 233: We conclude, therefore, that because it allows prejudgment seizures without notice, a prior hearing or other sufficient safeguards, and cannot be justified under the extraordinary circumstances exception, Maryland's mechanics lien law is incompatible with the due process clauses of Article 23 and the Fourteenth Amendment."

The Court of Appeals of Maryland recognized this fact on February 11, 1976 in Caplan Bros., Inc. v. The Village of Cross Keys, Inc. 277 Md 41, 353 A.2d 237 and granted certiorari while a case was pending in the Court of Special Appeals. The Court of Appeals, Judge, Singley, stated:

> "When we granted certiorari while this case was pending in the Court of Special Appeals, we were of the impression that the result would be controlled by Barry Properties, Inc. v. Fick Bros. Roofing Co., Md., 353 A.2d 222 (decided 10 February 1976)."

After the Court held in Barry properties, Inc. v. Fick Bros. Roofing Co., Md. 35 3A.2d. 222 Fed. 10, 1976 there was an onslaught by

contractors involving the public service commission of the state of Maryland and the Attorney General Stepehn H. Sachs wrote on March 10, 1981 to the Honorable Joseph E. Owens, Chairman, Committee of the Judiciary and encouraged the General Assembly of Maryland to repeal article - Real Property, sec. 10-109 Annotated Code of Maryland (1974 volume and 1980 supplement) by adding to article - Real Property section 14-118 Annotated Code of Maryland (1974) volume and 1980 supplement) to preserve enough to have a law capable of fulfilling the principle legislative intent.

The General Assemblys' enactment of the Annotated Code of Maryland Real Property, sec. 14-118 Disclosure of estimated cost of deferred water and sewer charges, provides:

> "(a) A contract of sale of improved, residential real property shall disclose to the

initial purchaser the estimated cost, as established by the appropriate water sewer authority, of any deferred water and sewer charges for which the purchaser may become liable. If the appropriate water and sewer authority has not established a schedule of charges for the water and sewer project that benefits the property or if a local jurisdiction has adopted a plan to benefit the property in the future, the contract of sale shall disclose that fact to the initial purchaser.

(b) Violation of this section entitles the initial purchaser to recover

from the seller two times the amount of deferred charges he is required to pay. (1981,ch.262.)"

Section (a) removed the right to sue at common law in the state court and imposed the penalty of sec(b).

TWO: Whether the abuse of discretion by Judge Perry in not disqualifying defendants counsel for violations of A.B.A. Code of Professional Responsibilities allowed a fair hearing on the merits of the case.

Judge Perry's failure to disqualify defense counsel and the in banc appeals panel order that the motion to strike the appearance be "Ne Recipiatur" must be resolved under 28 U.S.C.A.

section 1291 of claims that may fairly be assessed only after trial. United States v. MacDonald supra, at 860, 56 L Ed 2d 128, 98 S Ct 1547, and those involving "considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Coopers & Lybrand v. Livesay, 437 US, at 469, 57 L Ed 2d 351, 98 S Ct 2454, quoting Mercantile National Bank v. Langdeau, 371 US 555, 558, 9 L Ed 2d 523, 83 S Ct 520 (1963).

The rule also serves the important purpose of promoting efficient judicial administration. Eisen v. Carlisle & Jacquelin, 417 US 156, 170, 40 L Ed 2d 732, 94 S Ct. 2140, 1974.

Defendant, Thomas Smith, Esq. never entered an appearance in the case. However, he paid the witnesses to change the evidence in this matter.

> "DR7-109 provides that "a lawyer shall not pay, offer to pay, or acquiesce in the payment of

compensation to a witness contingent on the content of his testimony or the outcome of the case.."

Defendant, Smith cannot pay money to witness in a matter before the court, and his law partner, Mr. Miles argues that there is no cause of action in the same matter with the same parties. John R. Miles must withdraw pursuant to:

Maryland Rule 1.10. Imputed Disqualification:General Rule.

"(a)While lawyers are associated in a firm, none of them shall represent a client when anyone of them practing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2"

and

"DR.5-105 (D) provides that

"if a lawyer is required to

decline or to withdraw from

employment under a Disciplinary

Rule, no partner, or associate,

or affiliate with him or his firm,

may accept or continue such employ-

ment."

Maryland Rule 8.3 requires Reporting Professional Misconduct.

"(a)a lawyer having knowledge

that another lawyer has

committed a violation of the

Rules of Professional Conduct

that raises a substantial

question as to that lawyer's

honesty, trustworthiness or

fitness as a lawyer in other

respects shall inform the

appropriate professional authority."

"DR 1-103 (A) provides that a lawyer possessing unprivileged knowledge of a violation of a Disciplinary Rule shall report such knowledge to ... authority empowered to investigate or act upon such violation."

ARGUMENT

Real Property sec. 14-118 provides that owners being given notice and an opportunity for a hearing safeguards such as those discussed in Mitchell v. W.T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974), and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975).

This Court has traditionally held that a practical application prevails over a technical construction.

> "Due process is flexible and calls for such procedural protections as the particular situation demands"
>
> Morrissey v. Brewer, 408 U.S.471,481
>
> "The fundamental request of the due process of law is the opportunity to be heard."

Granis v. Ordean, 234 U.S. 385,394.(1914)

Appendix A-5 - A7, letter of Thomas P. Smith paying witness, Arlington Mortgage Company.

Appendix A-8 - A-10, letter of Thomas P. Smith paying witness, Washington Suburban Sanitary Commission.

Judge Perry dismissed action for no cause of action, sec. 14-118 provides:

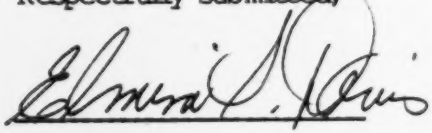
> (b) Violation of this section entitles the initial purchaser to recover from the seller two times the amount of deferred charges he is required to pay.

Judge Perry relied soley on the statement of senior law partner, John Miles that "all deferred house connection fee had been paid," Appendix A-11 -A-15, affidavit of water house connection fee of 1737.72 is still owed to Washington Suburban Sanitary Commission.

CONCLUSION

For the reasons setforth above, the order of Judge Perry should be vacated and remanded for further proceedings to determine whether the notice required by sec. 14-118 and by the procedural due process clause of the Fourteenth Amendment was given to prevent the constitutional prejudgment seizures of property without notice held in Barry Properties, Inc. v. Fick Bros, Roofing Co., Supra.

Respectfully submitted,



Elmira S. Davis

APPENDIX

APPENDIX

TABLE OF CONTENTS

	Page
Circuit Court Docket Entries	A-1, A-2
Order of the Court of Appeals of the State of Maryland	A-3
Order Denying Motion For Reconsideration	A-4
Letter from Thomas P. Smith, O'Malley Miles & Harrell to S. Randal Cohen paying on WSSC charges	A-5 - A-7
Letter from Thomas P. Smith, O'Malley Miles & Harrell to WSSC paying on bill	A-8 - A-10
Affidavit of Harlis T. Bolling	A-11, A-12
WSSC Charges/Bill on Property	A-13- A-15

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S

COUNTY, MARYLAND

VERNON C. DAVIS and

ELMIRA S. DAVIS,

Plaintiffs

v. Case No. CAL 7-20139

THOMAS FARASY, PRESIDENT

PERPETUAL REAL ESTATE

SERVICES, INC., and

THOMAS P. SMITH,

Defendants

DOCKET ENTRIES

DOCKET NO. 053 DATE: 11/04/88

NOTE: D/S PERRY. MOTION TO DISMISS

NOTE: GRANTED W/OUT LEAVE TO AMEND.

NOTE: JUDG ENTERED IN FAVOR

NOTE: OF THE DEF FOR

DOCKET NO. 060 DATE: 02/02/89

NOTE: M O T I O N T O S T R I K E T H E

NOTE: APPEARANCE OF ATTORNEY JOHN

NOTE: MILES FD. MM

DOCKET NO. 063 DATE: 02/17/89

NOTE: D/S IN BANC HEARING. MOTION TO

NOTE: DISMISS IN BANC APPEAL GRANTED

NOTE: ALL CLAIMS COMPLETE; CASE

NOTE: CLOSED.

VERNON C. DAVIS et ux. * IN THE

* COURT OF APPEALS

v. * OF MARYLAND

THOMAS FARASY, et al. * Petition Docket No.52

September Term 1989

(No.CAL 7-20139

Circuit Court for

Prince George's

County)

*****

ORDER

Upon consideration of the petition for writ of certiorari to the Circuit Court for Prince George's County and the Motion to Dismiss and Opposition filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy

Chief Judge

Date: June 15, 1989

VERNON C. DAVIS, et ux. * IN THE

* COURT OF APPEALS

v. * OF MARYLAND

* Petition Docket No.52

THOMAS FARASY, et al. * September Term 1989

(No.CAL 7-20139,

Circuit Court for

Prince George's

County

****

ORDER

Upon consideration of the motion for reconsideration filed in the above entitled case, it is this 31st day of August, 1989.

ORDERED, by the Court of Appeals of Maryla,hat the motion be, and it is hereby, denied.

/s/ Robert C. Murphy

Chief Judge

LAW OFFICES

O'MALLEY, MILES & HARRELL

99 COMMERCE PLACE

P.O. BOX 900

UPPER MARLBORO, MARYLAND 20772

(301)350-1300

September 24, 1987

S. Randal Cohen, Esquire

Riggs Building

Suite 100

7411 Riggs Road

Langley Park, Maryland 20783

Re: Perpetual Real Estate Services and Mr. and Mrs. Davis

Dear Mr. Cohen:

Settlement negotiations between my client Perpetual Real Estate Services and Mr. and Mrs. Davis, seem to have fallen through. As you can see by the enclosed letter we are unilaterally paying

WSSC Charges #002 and #004 on the Davis property. The payments to WSSC are predicated upon the fact that Arlington Mortgage Company has paid the WSSC charges for the years 1985, 1986 and 1987. Attached is a letter from P. Thomas May, Jr., dates August 27, 1987. According to my calculations, WSSC charges are attributable to Accounts #002 and #004 for the three (3) years in question should total $2,474.76.

At your suggestion, I am enclosing a check payable to Arlington Mortgage in that amount for the payment of past sewer/water charges on #002 and #004 account numbers for the years 1985, 1986 and

fiscal year 1987-88. I appreciate your advice that it makes more sense to send them to you to make sure your client appropriately credits the correct account numbers.

I believe with our payment to WSSC and the tax payment that your client sent in August to Prince George's County, that there should be no future WSSC charges due under Accounts #002 and #004. I would appreciate advice from your client if its opinion is any different or if you have any additional information.

Very truly yours,

Thomas P. Smith

Enclosure

cc: John C. Curtin

LAW OFFICES

O'MALLEY, MILES & HARRELL

99 COMMERCE PLACE

P.O. BOX 900

UPPER MARLBORO, MARYLAND 20772

(301)350-1300

September 24, 1989

CERTIFIED MAIL

Washington Suburban Sanitary Commission

4017 Hamilton Street

Hyattsville, Maryland 20781

Gentlemen:

Attached to this letter is a printout dated August 20, 1987, concerning certain real property owned by Mr. and Mrs. Davis. The undersigned represents Perpetual Real Estate Services, Inc., the developer of this property. A dispute has arisen between my client and the Davis' concerning certain disclosures in the Contract of Sale for the purchase of this

property. The enclosed check in the amount of $6,756.59 is to be applied to Charges #002 and #004. Please initially pay Charge #002 and apply the balance to Charge #004.

I have concurrently written Mr. & Mrs. Davis' mortgage company who informs me that they have paid the taxes for fiscal year 1987-88, including the Washington Sanitary Suburban charges that would be applicable to the above-referenced charges specified in account numbers #002 and #004. According to my computations the payments made by the mortgage company together with this check should completely pay Charges #002 and #004. In the event there is any excess, please return the same to me. In the event there is a deficit remaining after the payment applied with

the enclosed check and the recent tax payment by Arlington Mortage Company, I would appreciate written comunication from you as to what that deficit might be as to Account #002 and #004 and how you computed the same.

Very truly yours,

Thomas P. Smith

TPS:gd

Enclosures

cc: S. Randall Cohen, Esquire

AFFIDAVIT OF

HARLIS T. BOLLING

I, Harlis T. Bolling, Assessments Supervisor for the Washington Suburban Sanitary Commission (WSSC), do hereby certify that the annexed copy, or each of the specified annexed copies, is a true, correct and compared copy of a document in my official custody as hereinafter described pursuant to Courts and Judicial Proceedings Article, Maryland Annotated Code Section 10-204:

> The Assessment disclosure/redemption form for the property address 11702 Piscataway Road, Clinton, MD., 20735, as of July 28, 1989.

I solemnly affirm under the penalties of perjury that the contents of the foregoing paper are true to the best of my knowledge, information and belief.

_____ _____

Date

Harris T. Bolling
Supervisor
Washington Suburban
Sanitary Commission

WASHINGTON SUBURBAN

SANITARY COMMISSION

4017 Hamilton Street Hyattsville, MD 20781

301 699-4000

Assessments Section 301 699-4779

Elmira S. Davis July 28, 1989

SAME

11702 PISCATAWAY RD County: PRINCE

CLINTON MD 20735-0000 GEORGE'S

Elec.Dist: 05

Sub Code: 6750

Tax Act. 03524189

Block/Lot: 0 /1

Parcel: 00000000

Subdiv: Mary

Catherine

ESTS BLK L

Address: 011702

Piscataway

RD

Owner: D A V I S

ELMIRA S

The following is the requested information with regard to the above mentioned property:

Charge #	Water or Sewer	Type of Charge	Annual Charge	Amount to pay in full
001	W	FFBC	220.72	1938.83
005	S	FFBC	90.18	792.15
003	W	H-C	194.98	1737.72
004	S	H-C	.00	REDEEMED
	TOTAL		505.88	4468.70

A True Test Copy

_____

William S. Lindung

Secretary

Notes: 1. Pay in full quotations are valid through May 31, 1990. Remittances must be received by May 31 to effect removal of that year's annual charge from July property tax bill.

2. Please attach a copy of this form with your payment if you wish to pay in full one or more of the assessment charges.

Prepared by:_____

1102-45(2/89